

1 HONORABLE RICHARD A. JONES

2
3
4
5
6
7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 ANNA WILSON,

10 Plaintiff,

11 v.

12 GEICO INDEMNITY COMPANY,

13 Defendant.

CASE NO. C18-226 RAJ

ORDER

14
15 This matter comes before the Court on Defendant Geico Indemnity Company's
16 ("Geico") Motion for Summary Judgment. Dkt. # 10. Plaintiff opposes, and Geico has
17 filed a Reply. Dkt. ## 24, 26. Having considered the submissions of the parties, the
18 relevant portions of the record, and the applicable law, the Court finds that oral argument
19 is unnecessary. For the reasons that follow, Geico's Motion for Summary Judgment is
20 **DENIED**. Dkt. # 10.

21 **I. BACKGROUND**

22 For purposes of this motion, the Court construes the facts in the light most
23 favorable to Plaintiffs, the non-moving party. Plaintiff was involved in a collision on
24 August 11, 2016, in which she was an occupant of a driver insured by Geico. Dkt. # 1-1
25 at p. 2, ¶ 2.2. Plaintiff then submitted a claim for income continuation and medical
26
27
28

1 benefits to Geico for Personal Injury Protection (“PIP”) benefits pursuant to the insured
2 driver’s insurance policy. Dkt. # 11-1.

3 Geico commenced an investigation of Plaintiff’s claim. During this investigation,
4 Geico contacted Plaintiff’s employer and union and obtained Plaintiff’s “HR file,”
5 payroll records, and other information. *See generally* Dkt. ## 11-11, 11-15, 11-16, 25-4,
6 25-5, 25-6, 25-7, 25-11 to 25-16, 25-19 to 25-24. Plaintiff gave a recorded statement to
7 Geico and provided authorization for Geico to obtain her medical records. Dkt. # 25-1 at
8 p. 11:17-25. Plaintiff also submitted to independent medical examinations on June 27,
9 2017, November 16, 2017, and November 20, 2017. Dkt. ## 11-10, 11-19, 11-20.

10 On December 13, 2017, Geico sent a letter to Plaintiff’s counsel stating the
11 following:

12 According to John Wendt, M.D., “On Objective basis, the
13 individual has reached maximum medical improvement.
14 Again the effective date, we would expect it to have been
normally one month after the accident.” Therefore, we are
suspending all medical payments for treatment which your
client receives after 05/22/2017

15 According to Dr. Douglas H. Pepper, “In summary, the
16 claimant is capable of working and the wage loss and /or
17 restrictions would not be result of the accident.” Therefore,
we are denying the lost wage claim.

18 Dkt. # 25-30. On December 14, 2017, Plaintiff filed a 20-day notice of potential lawsuit
19 under Washington’s Insurance Fair Conduct Act, RCW 48.30.015. Dkt. # 11-3, 11-4.

20 On December 29, 2017, Geico, now communicating through counsel, argued that
21 Plaintiff’s IFCA notice was “defective,” and requested an “Examination Under Oath”
22 (“EUO”) pursuant to the insurance policy in January 2018. Dkt. # 11-3.

1 Specifically, Defendant's letter stated:

2 As you are aware, GEICO has not denied your client's claim.
3 Rather, there is a dispute about the amount of Personal Injury
Protection benefits for which your client is entitled to recover.

4 As you are aware, GEICO has determined that your client did
5 not have any wage loss as a result of the above referenced
6 loss. You and your client disagree with GEICO's
determination.

7 As such, GEICO wishes to conduct your client's examination
8 under oath pursuant to the terms and conditions of the policy
and Washington State statute.

9 *Id.* Geico also requested additional documents from Plaintiff, including (1) "income tax
10 returns, evidence of income for the twelve months prior to the loss, and W-2 forms or
11 other documents substantiating employment for the last two years"; (2) a list of "all costs,
12 expenses and damages which your client is claiming"; and (3) a "listing of each and
13 every employer for the past four years." *Id.* at 2.

14 Following several communications, on January 23, 2018, Plaintiff's counsel
15 responded, claiming that Defendant's "material breaches and repudiation of the insurance
16 contract relieve Ms. Wilson, as the non-breaching party, of further performance," and
17 arguing that the commencement of litigation, with the promise of discovery, made
18 Defendant's EUO and information requests moot. Dkt. # 11-8. On February 1, 2018,
19 Defendant responded, claiming that Plaintiff has failed to comply with the policy by not
20 appearing for an EUO, and again claimed that Defendant "has never denied coverage for
21 this case." Dkt. # 11-9.

22 On January 23, 2018, Plaintiff Anna Wilson filed this action in King County
23 Superior Court against Defendant Geico Indemnity Company. Dkt. # 1. Plaintiff's
24 Complaint alleged that Geico is in breach of contract by failing to pay claims made under
25 the insurance policy. Dkt. # 1-1. Plaintiff's Complaint seeks damages for breach of
26 contract, breach of the duty to act in good faith, as well as claims under the IFCA and

1 Washington’s Consumer Protection Act, RCW 19.86.090 (“CPA”). *Id.* Defendant then
2 filed a Notice of Removal on February 12, 2018. Dkt. # 1. Defendant filed its Answer
3 on February 28, 2018. Dkt. # 6.

4 Geico now moves for summary judgment on the basis that Plaintiff violated the
5 insurance policy’s cooperation clause by not submitting to the EUO and providing
6 requested information. Dkt. # 10. Plaintiff opposes, and Defendants have filed a Reply.
7 Dkt. ## 24, 26.

8 **II. LEGAL STANDARD**

9 Summary judgment is appropriate if there is no genuine dispute as to any material
10 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
11 56(a). The moving party bears the initial burden of demonstrating the absence of a
12 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
13 Where the moving party will have the burden of proof at trial, it must affirmatively
14 demonstrate that no reasonable trier of fact could find other than for the moving party.
15 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where
16 the nonmoving party will bear the burden of proof at trial, the moving party can prevail
17 merely by pointing out to the district court that there is an absence of evidence to support
18 the non-moving party’s case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets
19 the initial burden, the opposing party must set forth specific facts showing that there is a
20 genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby,*
21 *Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most
22 favorable to the nonmoving party and draw all reasonable inferences in that party’s favor.
23 *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

24 However, the court need not, and will not, “scour the record in search of a genuine
25 issue of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996); *see also,*
26 *White v. McDonnell-Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (the court need not

1 “speculate on which portion of the record the nonmoving party relies, nor is it obliged to
2 wade through and search the entire record for some specific facts that might support the
3 nonmoving party’s claim”). The opposing party must present significant and probative
4 evidence to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*,
5 952 F.2d 1551, 1558 (9th Cir. 1991). Uncorroborated allegations and “self-serving
6 testimony” will not create a genuine issue of material fact. *Villiarimo v. Aloha Island*
7 *Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002); *T.W. Elec. Serv. V. Pac Elec. Contractors*
8 *Ass’n*, 809 F. 2d 626, 630 (9th Cir. 1987).

9 **III. DISCUSSION**

10 Geico claims that a provision of the insurance policy requires a claimant to submit
11 to an EUO upon Geico’s request:

12 **13. EXAMINATION UNDER OATH**

13 The insured or any other person seeking coverage under this
14 policy must submit to examination under oath by any person
named by us when and as often as we may require.

15 Dkt. # 11-2, at p. 17, ¶ 13. Geico also points to other provisions of the insurance policy
16 that claim that “no action will lie against [GEICO] unless there has been full compliance
17 with all the terms of the coverage.” Dkt. # 11-2, at p. 21, ¶ 3. Geico contends that
18 Plaintiff’s violation of these provisions means that her Complaint should be dismissed as
19 a matter of law.

20 The Court first addresses what appears to be a key factual issue in dispute:
21 whether Geico in fact denied Plaintiff coverage. Geico’s counsel argued that Geico
22 “never” denied Plaintiff coverage under the policy, and that Plaintiff’s claim “was open
23 when the request for the EUO was made.” Dkt. ## 11-9; 26 at 5. Plaintiff counters by
24 pointing to the December 13, 2017 letter from Geico where Geico stated that it was
25 “denying the lost wage claim” and “suspending all medical payments for treatment which
26 your client receives after 05/22/2017.” Dkt. ## 25-30. Geico responds by arguing that

1 this letter, despite its language, “did not deny coverage,” and merely “stated its position
2 that the investigation did not support any further PIP benefits.” Dkt. # 26 at 6.

3 The Court finds Geico’s position less than compelling. Despite Geico’s repeated
4 insistence that there has been no denial, the clear language of Geico December 13, 2017
5 letter suggests otherwise. The Court finds it difficult to see how this letter purportedly
6 “denying” coverage and “suspending” payments is not, in fact, a denial.¹ The Court
7 concludes that, at the very least, there exists a genuine issue of material fact as to whether
8 Geico’s December 13, 2017 letter constitutes a “denial” of coverage under the insurance
9 policy. At the summary judgment stage, the Court will thus view this evidence in the
10 light most favorable to Plaintiff, the nonmoving party, and construe the December 13,
11 2017 letter as a denial of coverage.

12 **A. Geico’s Affirmative Defense of Noncooperation**

13 Geico moves for summary judgment on its affirmative defense that Plaintiff failed to
14 cooperate under the provisions of the insurance policy, and thus is ineligible for coverage. Dkt.
15 # 10 at 10. Under Washington law, an insured that breaches a cooperation clause may be
16 contractually barred from bringing suit under the policy. *Staples v. Allstate Ins. Co.*, 176 Wash.
17 2d 404, 295 P.3d 201, 205 (2013). The burden of proving noncooperation is on the insurer.
18 *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wash.2d 372, 535 P.2d 816 (1975). To prevail on this
19 affirmative defense, an insurer must show three things: (1) the insured failed to “substantially
20 comply” with the terms of the cooperation clause; (2) the information at issue was material to the
21 circumstances giving rise to the insurer's liability, (3) the insurer suffered actual prejudiced as a

22
23 ¹ The Court recognizes that, depending on the circumstances, this apparent denial of coverage
24 may have the effect of discharging Plaintiff’s duty to cooperate under the insurance policy. *See,*
25 *e.g, Kienle v. Flack*, 416 F.2d 693, 695 (9th Cir. 1969)(“[T]he general rule is that an insurer is
26 estopped from relying on breaches of the cooperation clause occurring after the insurer has
27 improperly denied coverage under the policy.”); *Ass’n of Apartment Owners of Imperial Plaza v.*
28 *Fireman’s Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1067 (D. Haw. 2013)(“Plaintiff’s decision not to
volunteer information after the denial letter does not rise to the level of conduct establishing a
breach of the cooperation clause.”). However, the parties have not briefed this issue, and the
Court is not prepared to rule on this issue based on the current record.

1 result. *See Pilgrim v. State Farm Fire & Cas. Ins. Co.*, 89 Wash.App. 712, 950 P.2d 479, 483
2 (1997); *Tran v. State Farm Fire & Cas. Co.*, 136 Wash.2d 214, 961 P.2d 358, 363 (1998); *Mut.*
3 *of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wash.2d 411, 191 P.3d 866, 877 (2008).

4 **1. Substantial Cooperation**

5 Most insurance policies contain cooperation clauses requiring the insured to
6 cooperate with the insurer's handling of claims. *Staples*, 176 Wash. 2d at 410 (citing
7 Thomas V. Harris, Washington Insurance Law § 13.02, at 13–11, 13–12 (3d ed. 2010)).
8 Typically, an insured that “substantially and materially” breaches a cooperation clause is
9 contractually barred from bringing suit under the policy if the insurer can show it has
10 been actually prejudiced. *Id.* However, the burden of proving noncooperation is on the
11 insurer. *Salzberg*, 85 Wash.2d at 375–76.

12 Geico claims that Plaintiff’s refusal in early 2018 to submit to Geico’s EUO and
13 information requests indicates that Plaintiff did not “substantially cooperate” with the
14 insurance policy’s cooperation clauses. Geico primarily relies on the Washington
15 Supreme Court’s decision in *Tran v. State Farm Fire & Cas. Co.*, 136 Wash.2d 214, 961
16 P.2d 358, 363 (1998). In *Tran*, the insured made a claim based on an alleged burglary,
17 but then refused to cooperate with the insurer's investigation: he failed to provide
18 documentation with his initial claim, delayed the investigation by months, refused to
19 return phone calls, rejected requests for information regarding the allegedly stolen
20 property and his financial records, provided the police and the insurer with different
21 stories as to what occurred on the day of the burglary, and inexplicably withdrew his
22 claim for some items that he initially indicated were stolen. *Tran*, 961 P.2d at 361, 364.
23 The court found that, in these circumstances, “the possibility of fraud was distinct.” *Id.* at
24 365.

25 Based on the current record, the facts of this case are distinct from the “extreme”
26 circumstances of *Tran*. The insured in *Tran* effectively “stonewalled” his insurer during
27

1 its investigation, before the insurer could determine coverage. *Staples*, 176 Wash.2d at
2 420. Here, the record reflects that Plaintiff cooperated and provided requested
3 information up to the point of Geico’s apparent denial of coverage on December 13,
4 2017. The record indicates that Plaintiff provided documents from her employer, medical
5 records, a recorded statement, and three independent medical examinations. Geico did
6 not accuse Plaintiff of any lack of cooperation *prior* to the apparent denial of coverage on
7 December 13, 2017. The only lack of cooperation Geico identifies is Plaintiff refusing to
8 submit to an EUO and provide accompanying information in January 2018, *after* the
9 denial of coverage. Dkt. # 10; *see also* Dkt. # 25-1 at p. 18:6-24. The Court thus cannot
10 conclude as a matter of law that Plaintiff’s actions evidence a lack of “substantial”
11 cooperation, especially given Plaintiff’s apparent full cooperation up to the point of
12 Geico’s denial.

13 **2. Materiality**

14 If the action demanded under a cooperation clause is “not material to the
15 investigation or handling of a claim, an insurer cannot demand it.” *Staples*, 176 Wash.2d
16 at 414. An action is material if it is “concerning a subject reasonably relevant and
17 germane to the insurer’s investigation as it was proceeding at the time it made the
18 demand.” *Pilgrim v. State Farm Fire & Cas.*, 89 Wash. App. 712, 720, 950 P.2d 479
19 (1997). An insurance company “should not have license to burden an insured with
20 demands for items that are immaterial.” *Tran*, 136 Wash.2d at 232. “If the insurer
21 claims that it was deprived of the ability to investigate, it must show that the kind of
22 evidence that was lost would have been material to its defense.” *Mut. of Enumclaw Ins.*
23 *Co. v. USF Ins. Co.*, 164 Wash.2d 411, 430, 191 P.3d 866 (2008).

24 The Court finds little evidence in the record that would indicate whether or not the
25 EUO and accompanying information requests were “material” to the investigation.
26 Geico’s Motion argues that “the evidence sought by GEICO was material to its
27
28

1 investigation of Plaintiff's PIP injury and wage loss claims," but gives no further factual
2 details to support this conclusion. Dkt. # 10 at 14. Geico does not explain how the
3 information sought would change Geico's ultimate decision on Plaintiff's claim for
4 coverage. Geico does not explain what attempts it made to obtain the requested
5 information from other sources. Geico was apparently in contact with one or more of
6 Plaintiff's employers, had access to her medical records, and had the results of two
7 independent medical examiners, and does not explain why this information was not
8 sufficient to make a coverage determination. *See, e.g.*, Dkt. ## 11-10, 11-1 11-15, 11-16,
9 11-20, 25-4, 25-5, 25-6, 25-7, 25-11 to 25-16, 25-19 to 25-24. On the contrary, the fact
10 that Geico requested an EUO and information two weeks after denying Plaintiff's claims
11 indicates that this information was not "material" to that determination.

12 The Court thus believes there exists, at the very least, a genuine issue of material
13 fact as to materiality of the EUO.

14 3. Prejudice

15 Even if the Court concludes that Plaintiff had not substantially complied with the
16 policy and the information denied was material, the Court would still find that at this
17 point, Defendant has failed to demonstrate prejudice. A claim of actual prejudice
18 requires "affirmative proof of an advantage lost or disadvantage suffered as a result of the
19 breach, which has an identifiable detrimental effect on the insurer's ability to evaluate or
20 present its defenses to coverage or liability." *Staples*, 295 P.3d at 207 (quoting *Tran*, 961
21 P.2d at 365) (internal punctuation omitted). "The burden of showing the actual prejudice
22 is on the insurer." *Id.* (citing *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wash.2d 372, 535
23 P.2d 816, 819 (1975)). Moreover, "not every breach discharges performance" by the
24 insurer. *Pilgrim*, 89 Wash. App. at 724–25, 950 P.2d 479. "Prejudice is an issue of fact
25 that will seldom be established as a matter of law." *Id.* Therefore, prejudice will be
26
27

1 presumed only in “extreme cases.” *Id.* (quoting *Pub. Util., Dist. No. 1 of Klickitat Cnty.*
2 *v. Int’l Ins. Co.*, 124 Wash.2d 789, 881 P.2d 1020, 1029 (1994)).

3 Plaintiffs rely heavily on *Staples v. Allstate Ins. Co.*, 176 Wash.2d 404, 408–09,
4 295 P.3d 201 (2013), and the Court finds this case instructive.² In *Staples*, Allstate
5 denied Staples’ first party insurance claim after Staples failed to submit to an EUO. In
6 Staples’ appeal, Allstate contended that submission to an EUO was a condition precedent
7 to its payment of benefits. *Staples*, 176 Wash.2d at 417, 295 P.3d 201. The Washington
8 Supreme Court rejected Allstate’s assertion, holding instead that “noncooperation does
9 not absolve an insurer of liability unless the insurer was actually prejudiced.” *Staples*,
10 176 Wash.2d at 417–18, 295 P.3d 201 (citing *Tran v. State Farm Fire & Cas. Co.*, 136
11 Wash.2d 214, 228, 961 P.2d 358 (1998)). As the Washington Supreme Court noted, the
12 prejudice requirement “prevent[s] insurers from receiving windfalls at the expense of the
13 public.” *Staples*, 176 Wash.2d at 418, 295 P.3d 201; *accord Or. Auto. Ins. Co. v.*
14 *Salzberg*, 85 Wash.2d 372, 377, 535 P.2d 816 (1975) (finding that genuine issue of
15 material fact existed as to whether insurer was prejudiced by insured’s breach of
16 cooperation clause, and therefore precluded summary judgment).

17 Here, Geico presents no affirmative evidence of prejudice. Geico does not
18 identify what advantage it lost as a result of Plaintiff refusal to appear at an EUO after an
19 apparent denial of coverage. Geico’s only attempt to clarify its claims of prejudice is an
20 argument that Plaintiff’s refusal “thwart[ed]” Geico’s efforts “to resolve the conflicting
21 evidence regarding her employment and the extent of her injuries,” and thus “prevented
22

23 ² The Court notes that Geico made no mention of *Staples* in its opening brief. Dkt. # 10.
24 Moreover, one member of Geico’s counsel, Rory W. Leid, was the same lawyer that
25 unsuccessfully argued for Allstate before the Washington Supreme Court. *Staples*, 176 Wash.2d
26 at 405. The Court finds it hard to believe that Geico’s counsel was not aware of this highly
27 persuasive and potentially binding Washington authority. The Court reminds Mr. Leid of his
28 obligations under Washington Rule of Professional Conduct 3.3(a)(3) to disclose adverse “legal
authority in the controlling jurisdiction known to the lawyer.” The Court expects that both
parties fulfill their duties of candor toward this Court, and warns Geico’s counsel that failure to
fulfill this duty may result in sanctions.

1 Geico from completing its investigation.” Dkt. # 10 at 12-13. Geico apparently had no
2 trouble resolving the “conflicting evidence” prior to denying coverage on December 13,
3 2017, and Geico does not provide evidence that the EUO or the accompanying
4 information requests would have changed Geico’s decision.³ Even under *Tran*, the Court
5 finds that Geico has failed to demonstrate prejudice in Geico’s “ability to determine
6 coverage.” *Tran*, 136 Wash. 2d at 229.

7 The Court will thus not presume any prejudice, and Geico cannot will prejudice
8 into existence by simply repeating its name. In order to prevail at summary judgment,
9 Geico was required to provide “affirmative proof of an advantage lost or disadvantage
10 suffered,” and Geico failed to do so. As such, summary judgment is inappropriate.

11 IV. CONCLUSION

12 For all the foregoing reasons, the Court **DENIES** Defendant’s Motion for
13 Summary Judgment. Dkt. # 10.

14 Dated this 15th day of August, 2018.

16
17 

18 The Honorable Richard A. Jones
19 United States District Judge

20
21
22
23
24

³ Plaintiff also contends that Geico can remedy any prejudice caused by Plaintiff’s refusal to
25 appear for an EUO through litigation discovery. Geico argues that Plaintiff cannot cure a failure
26 to appear for an EUO by submitting to discovery in litigation. Dkt. # 10 at 15. However, neither
27 party submits controlling authority on this point. Geico cites three cases that do not purport to
28 address this issue. *Id.* (citing cases). Plaintiff does not cite any legal authority whatsoever for its
position. Dkt. # 24 at 10. The Court thus declines to resolve the issue at this juncture.